STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED July 13, 2010
v	No. 285331 Saginaw Circuit Court
PAUL DAVID-BUCKLEY HENDERSON, Defendant-Appellant.	LC No. 06-028072-FC

Before: TALBOT, P.J., and FITZGERALD and DAVIS, JJ.

PER CURIAM.

Defendant appeals as of right[1] his jury trial convictions of attempted murder, MCL 750.91, breaking and entering, MCL 750.110, and possession or use of a harmful chemical device, MCL 750.200i, and two counts of arson, MCL 750.72 (dwelling house and curtilage). Defendant was sentenced to concurrent terms of 60 months to 10 years' imprisonment for the breaking and entering conviction, and 126 months to 20 years' imprisonment each on the attempted murder conviction, the arson convictions and for unlawful possession of a harmful chemical device. We affirm.

I. FACTUAL HISTORY

In the early morning hours of August 5, 2006, Brittany Tyus, her mother, Traci Young, and her friends Rachel Ladrig and Jacob Westphal, were at Young's residence. Just before falling asleep, Tyus noticed a bright light outside her bedroom window. The light was from a backyard shed that was engulfed in flames. In addition to the shed, firefighters discovered a small fire burning under the deck attached to the residence, and that two areas on the side of the house were scorched and warped by fires that had been set but extinguished. One of the scorched areas was located directly beneath the home's gas meter. A fire investigator determined that gasoline was used as an accelerant.

[1] Following this Court's dismissal for want of prosecution, *People v Henderson*, unpublished order of the Court of Appeals, entered February 11, 2009 (Docket No. 285331), defendant sought leave to appeal to our Supreme Court. In lieu of granting leave to appeal, the Supreme Court remanded the case with instructions to treat defendant's brief on appeal as timely filed. *People v Henderson*, 485 Mich 1037; 776 NW2d 906 (2010).

Saginaw Township Police Detective Chad Brooks investigated the fire. The home had a surveillance system, which captured images of the individual setting the fires. Tyus identified defendant, a high school classmate, as the person in the surveillance video. Tyus also informed Brooks that she and defendant had a history of animosity and conflict.

Brooks and Saginaw Township Police Officer Mindy Worden, went to defendant's home to question him and were met by defendant's mother, Jennifer Newmann. Brooks indicated to Newmann that he wished to question defendant alone, and Newmann asked them to go into the house so that the neighbors would not observe the interaction. Brooks and defendant concur that defendant was questioned in his home and that he did confess to taking gasoline and matches to Tyus' house and setting the fires. Defendant was arrested and transported to the police station, where he was given *Miranda*[2] warnings, signed a *Miranda* waiver, and provided a confession.[3]

At issue are discrepancies between Brooks' and defendant's descriptions of the manner in which the interview was conducted. Defendant contends that Brooks informed him that he would have to either answer questions at defendant's home or at the police station. Newmann supported this contention and asserted that Brooks precluded her attempts to terminate the interview in the home. Defendant also claimed that he maintained his innocence until Worden detected an odor of gasoline emanating from defendant's shoes. Defendant further asserts that Brooks indicated that he had influence with the prosecutor, and that if defendant cooperated he would be only be charged with arson of the shed and would not receive jail time. In contrast, Brooks asserts that he never told defendant he had to speak with him and that defendant confessed after being apprised of the existence of the surveillance video. While disclaiming knowledge of what he meant when stating, "we've talked about this before," Brooks asserted that the first and only discussion of potential charges and punishment occurred at the police station during the second confession when he told defendant:

> Well, it's a first time offense for you. You have to understand, you know, we've talked about this before, this is a—I'm not going to make you any promises or anything, but I've been doing this long enough. I know that people, for first-time offenses, they don't go to prison. I'm not saying that you won't, but the chances are slim.

At the conclusion of the *Walker*[4] hearing, the trial court found Brooks' testimony to be the more credible. The trial court further determined that the interview at defendant's home was not custodial and that defendant's confession in police custody followed a valid *Miranda* waiver. The court ruled that the confessions were voluntary and admissible at trial finding they were not induced because Brooks' statements did not constitute a promise of leniency and did not precede defendant's confessions.

---

[2] *Miranda v Arizona*, 384 US 436, 444; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

[3] Defendant's first confession was not recorded due to an equipment malfunction, but his second confession was recorded.

[4] *People v Walker (On Rehearing)*, 374 Mich 331, 338; 132 NW2 87 (1965).

At the close of the prosecution's case, defendant sought a directed verdict on the charge of attempted murder, arguing that the prosecution had failed to produce sufficient evidence to support a finding of an intent to kill. The motion was denied and the jury returned guilty verdicts on all charges. This appeal ensued.

II. ANALYSIS

Defendant first contends that the trial court erred in finding his confession voluntary and admissible because he was in custody at the time of the interrogation in his home and that his confession was induced by a promise of leniency. We will affirm the decision of a trial court following a *Walker* hearing unless, after a review of the record, we are left with a "definite and firm conviction that a mistake was committed by the trial judge." *People v McGillen*, 392 Mich 251, 257; 220 NW2d 677 (1974). We defer to the trial court's superior ability to judge the credibility of witnesses. *People v Tierney*, 266 Mich App 687, 708; 703 NW2d 204 (2005).

Both the Michigan and United States Constitutions protect an accused's right against self-incrimination. US Const, Am V; Const 1963, art 1, § 17. Unless a suspect voluntarily waived his right against self-incrimination, any statement made by the suspect during custodial interrogation is inadmissible. *Miranda v Arizona*, 384 US 436, 444; 86 S Ct 1602; 16 L Ed 2d 694 (1966). An interrogation is deemed custodial only if the defendant "has been taken into custody or otherwise deprived of his freedom of action in any significant way." *People v Zahn*, 234 Mich App 438, 449; 594 NW2d 120 (1999). In determining whether an interrogation was custodial for *Miranda* purposes, we examine "the totality of the circumstances, with the key question being whether the accused reasonably could have believed that he was not free to leave." *Id.* "The determination of custody depends on the objective circumstances of the interrogation rather than the subjective views harbored by either the interrogating officers or the person being questioned." *Id.*

Brooks denied that defendant was told he had to cooperate or he would be arrested. At the conclusion of the *Walker* hearing, the trial court found that defendant's testimony was not credible. Further, an interrogation in a suspect's own home is usually considered non-custodial. *People v Mayes*, 202 Mich App 181, 196; 508 NW2d 161 (1993) (Corrigan, J., concurring), citing *Beckwith v United States*, 425 US 341; 96 S Ct 1612; 48 L Ed 2d 1 (1976). The interrogation, as described by Brooks, did not evince any characteristics that would transform it into a custodial interrogation.

Whether a confession was induced by a promise of leniency is also a factor in determining whether it was voluntary. *People v Conte*, 421 Mich 704, 754; 365 NW2d 648 (1984). Citing *Conte*, defendant argues that a confession induced by a promise of leniency is per se involuntary and inadmissible. Defendant has misconstrued the reasoning in *Conte*. As this Court has explained:

> In the lead opinion in [*Conte*], three justices (Williams, Kavanagh, and Levin) did support a rule that a confession obtained by a law enforcement official's promise of leniency automatically renders the confession involuntary and inadmissible. However, four justices (Boyle, Ryan, Brickley, and Cavanagh), and hence a majority of the Court, rejected this rule. These four held that a defendant's inculpatory statement is not inadmissible per se if induced by a promise of

> leniency. Rather, a promise of leniency is merely one factor to be considered in the evaluation of the voluntariness of a defendant's statements. [*People v Givans*, 227 Mich App 113, 119-120; 575 NW2d 84 (1997) (citations omitted).]

In addition, the trial court found Brooks' testimony that no statement was made regarding leniency until after defendant had confessed to be credible and we must defer to the trial court's credibility determinations.

Next, defendant contends that the trial court erred in denying his motion for a directed verdict on the attempted murder charge. We review a denial of a directed verdict de novo. *People v Passage*, 277 Mich App 175, 176; 743 NW2d 746 (2007). "When reviewing a trial court's decision denying a motion for directed verdict . . . we review the evidence in a light most favorable to the prosecutor to determine whether a rational trier of fact could have found that the essential elements of the offense were proven beyond a reasonable doubt." *People v Couzens*, 480 Mich 240, 244; 747 NW2d 849 (2008).

Citing *People v Hall*, 174 Mich App 686; 436 NW2d 446 (1989) and *People v Graham*, 219 Mich App 707; 558 NW2d 2 (1996), defendant argues that the mere setting of a fire is insufficient to demonstrate the intent required to sustain an attempted murder conviction. Defendant misconstrues *Hall* and *Graham*, in which this Court reversed a defendant's conviction for attempted murder under facts similar to the instant case. Contrary to defendant's contention, reversal was not predicated on insufficient evidence. Rather, in the cited cases the jury was instructed that it could find that defendant "knowingly created a very high risk of death or bodily harm knowing that death or such harm was the likely result" in lieu of finding an intent to kill. *Hall*, 174 Mich App at 688-690; *Graham*, 219 Mich App at 710-711. Thus, reversal of the convictions in *Hall* and *Graham* was not because the jury could not have found intent to kill, but because the jury was improperly instructed.

In this case, the jury was properly instructed. While no direct evidence of defendant's intent was presented, "[a] trier of fact can infer a defendant's intent from his words, acts, means, or the manner used to commit the offense." *People v Harrison*, 283 Mich App 374, 382; 768 NW2d 98 (2009). Because it is impossible to read a defendant's mind, "[m]inimal circumstantial evidence is sufficient to prove an actor's state of mind." *People v Ortiz*, 249 Mich App 297, 301; 642 NW2d 417 (2001).

There was evidence that defendant had been involved in conflicts with Tyus. Defendant knew where Tyus lived, walked to her residence with matches and gasoline, and poured the accelerant on the side of the house in multiple locations, including beneath the gas meter, and attempted to start a fire. The attempt to set a fire beneath the gas meter is especially compelling, as this could have caused an explosion. In addition, a rational fact-finder could have inferred an intent to kill from defendant's attempt to burn the house when the occupants would be asleep. There was also evidence that defendant maintained animosity toward Westphal, and that he believed Westphal was at Tyus' home. Viewed in the light most favorable to the prosecution, this evidence is sufficient to find the requisite intent to kill.

Defendant also contends that the prosecutor's misconduct deprived him of a fair trial. Because defendant's trial counsel did not object to any of the conduct complained of on appeal, we review in accordance with the plain error rule. *People v Carines*, 460 Mich 750, 763-765;

597 NW2d 130 (1999). "To avoid forfeiture under the plain error rule, three requirements must be met: (1) the error must have occurred, (2) the error was plain, i.e., clear or obvious, (3) and the plain error affected substantial rights." *Id.* at 763. "No error requiring reversal will be found if the prejudicial effect of the prosecutor's comments could have been cured by a timely instruction." *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001).

The most serious allegations of prosecutorial misconduct involve statements made by the prosecutor in his opening remarks that were not subsequently supported by admissible evidence. In his opening statement, the prosecutor indicated that defendant admitted to smoking marijuana before setting the fires. While defendant admitted to consuming some alcohol, Brooks testified consistently at the preliminary examination, the *Walker* hearing and at trial that defendant denied the use of any drugs. Further, the prosecutor did not inquire at trial regarding any such admission by defendant. The prosecutor also said in his opening statement, "[Defendant] just wanted to scare somebody by burning—he was only going to burn down half the house. That is what he said." Again, no such admission by defendant appears in the preliminary examination or *Walker* hearing testimony. The prosecutor also told the jury that they would "hear from Detective McInerney," who could tell them "how long it can take you to die from smoke inhalation" and that "[t]here's no such thing as burning down half a house and try [sic] to scare somebody." Detective McInerney testified, but no testimony was elicited to support either of these assertions.

When a prosecutor raises issues "broader than the defendant's guilt or innocence," it puts at risk a defendant's right to a fair trial. *People v Dobek*, 274 Mich App 58, 63-64; 732 NW2d 546 (2007). In determining whether instances of prosecutorial misconduct deprived a defendant of a fair trial and require reversal, this Court must "examine the entire record and evaluate a prosecutor's remarks in context." *Id.* at 64. It is improper for a prosecutor to argue from facts that were not admitted into evidence. *Watson*, 245 Mich App at 588. This Court has stated, "when a prosecutor fails to prove allegations made during his opening statement, reversal is not required in the absence of bad faith *or prejudice to the defendant*." *People v Wolverton*, 227 Mich App 72, 75-76; 574 NW2d 703 (1998) (emphasis in original).

While it is questionable whether the prosecutor acted in good faith when making these statements, reversal is not required. First, the improper remarks did not result in any discernable prejudice to defendant. The reference to defendant's use of marijuana, while arguably inflammatory, was not relevant to any issue at trial. Nor was the reference to the possibility of "burning down half a house" overly prejudicial, given the evidence admitted demonstrating the amount and type of damage incurred. The prosecutor's reference to defendant's allegedly professed intent to scare could not be construed as prejudicial as it is contrary to the intent required to establish attempted murder. Second, the trial court specifically instructed the jury that statements or arguments by the attorneys were not to be construed as evidence. "[J]urors are presumed to follow their instructions." *People v Unger*, 278 Mich App 210, 235; 749 NW2d 272 (2008).

The remaining remarks cited by defendant were innocuous and did not result in prejudice. The prosecutor made two references to his father being a judge and once to his father having put him through law school. In the context the remarks were made, they were not intended to inflate or bolster the prosecutor's prestige in the eyes of the jury, but only to provide background to otherwise proper statements. We also find that the prosecutor's statement that this case gave him

"the shakes" because he had a son entering high school was not prejudicial. Viewed in context, this remark was aimed at describing the background of the case—animosity between high school classmates—rather than an attempt to evoke sympathy for the victims. The prosecutor's reference to prior bad acts was not an improper attempt to prove defendant's bad character, but was relevant to show the animosity existing between defendant and the victims, in order to establish motive. "Although motive is not an essential element of the crime, evidence of motive in a prosecution for murder is always relevant. In cases in which the proofs are circumstantial, evidence of motive is particularly relevant." *Unger*, 278 Mich App at 223. Finally, defendant argues that the prosecutor set up an "inflammatory . . . straw man" by saying that defendant intended to kill and was not engaged in a prank. Although defendant never indicated he viewed his actions as a prank, when taken in context, the remarks constitute a proper argument by the prosecutor that the evidence supported defendant's intent to kill.

Although we find that some of the prosecutor's remarks were improper or questionable, they were not prejudicial and did not serve to deprive defendant of a fair trial, especially in light of the overwhelming evidence properly admitted against defendant.

Finally, defendant argues that he was deprived of the effective assistance of counsel due to his trial counsel's failure to (1) object to the alleged instances of prosecutorial misconduct, (2) obtain written transcripts of the interviews with witnesses Tyus, Ladrig, and Westphal, and (3) realize that the surveillance video was playing in sight of the jury during defendant's closing statement. Because defendant did not preserve the issue by moving for a new trial or requesting a *Ginther*[5] hearing, we limit our review to mistakes apparent on the record. *People v Cox*, 268 Mich App 440, 453; 709 NW2d 152 (2005).

Addressing defendant's contentions pertaining to the failure to provide transcripts and the video playing during defendant's closing, we note that these alleged errors are not apparent or discernable from the record. We note that, at the hearing conducted on January 28, 2008, counsel only complained of the failure to provide transcripts of two videotaped interviews, but acknowledged that he had received copies of the interviews in "CD-ROM" format. Further, the trial court granted defense counsel's request to obtain transcriptions of the recordings and instructed him to secure preparation of the transcripts at the court's expense. We are unable to ascertain on the basis of the record before this Court whether defense counsel complied or determined they were unnecessary. On appeal, defendant merely contends error without any meaningful discussion of how these alleged errors resulted in prejudice and without any citation to supporting law. "An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, nor may he give only cursory treatment with little or no citation of supporting authority." *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998).

In order to establish ineffective assistance for his trial counsel's failure to object to the alleged instances of prosecutorial misconduct, defendant must demonstrate: (1) trial counsel's representation fell below an objective standard of reasonableness under prevailing professional

[5] *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

norms; (2) but for trial counsel's errors, there is a reasonable probability that the result of his trial would have been different; and (3) that the proceedings were fundamentally unfair or unreliable. *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000); *People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007). Effective assistance is presumed, and defendant bears a heavy burden of proving otherwise. *People v Frazier*, 478 Mich 231, 243; 733 NW2d 713 (2007); *People v Solmonson*, 261 Mich App 657, 663; 683 NW2d 761 (2004). To show that trial counsel's performance was deficient, "defendant must overcome the strong presumption that his counsel's action constituted sound trial strategy under the circumstances." *Toma*, 462 Mich at 302. Based on the overwhelming evidence against defendant, which included his confession and the surveillance video, it is unlikely that any objections by counsel to the improper statements of the prosecutor would have altered the outcome of the proceeding.

Affirmed.

/s/ Michael J. Talbot
/s/ E. Thomas Fitzgerald
/s/ Alton T. Davis